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Creators, Consumers, and Distributors: Understanding the Moral Structure of Digital Copyright

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Abstract: The debate surrounding copyright reform is complex and mired in seemingly irreconcilable perspectives. This article attempts to clarify the issues by explicating the underlying moral framework that informs copyright law. The three agents engaged in the copyright ecosystem are identified as the creator, the consumer, and the distributor. Each of these agents has a set of rights fixed by their particular roles, as well as desires regarding what they hope to gain by participating in the market for creative works. By examining how these rights and desires interact, a new perspective is brought to the questions of, (1) whether the current copyright regime is morally justified and (2) how it might be revised to better respect the rights and desires of the three agents.

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I. INTRODUCTION

John Tehranian, a professor at the University of Utah College of Law, recently calculated that a typical American, in the course of a single day and without the use of file-sharing programs, exposes himself to over twelve million dollars in statutory damages should every copyright holder whose rights he violates decide to sue.[1] He did this by imagining a law professor, who checks and responds to email, forwards digital pictures of a vacation, and performs many other innocuous activities engaged in by online users.[2]

Even if Professor Tehranian's estimates are off by an order of magnitude, the basic point is powerful. The simple fact remains that "[s]uch an outcome flies in the face of our basic sense of justice."[3] This digital lifestyle, which allows us to connect and share in ways that were unimaginable only a generation ago, should not be at odds with our system of law. The latter ought to embrace the former, not hold it forth as prey for litigious businesses, special interests, and outmoded conceptions of property.

A recent case involving Jammie Thomas, a Minnesota woman who at one time owed over $200,000 for making available two CDs worth of music on an Internet download service, [4] provides further illustration of the need to examine how copyright law impacts the emerging digital lifestyle.[5] The jury awarded the plaintiffs, a collection of music industry titans including EMI Group's Capitol Records, the Universal Music Group, Sony BMG Music Entertainment, and the Warner Music Group, $9,250 for each of twenty-four songs Ms. Thomas made available on the file-sharing network, Kazaa.[6] It was near the end of her trial when Jennifer Pariser, a top attorney at Sony

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[1] John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537, 547 (2007), *available at* http://www.law.utah.edu/_webfiles/ULRarticles/155/155.pdf.

[2] *Id.* at 543–47.

[3] *Id.* at 548.

[4] The Kazaa network is a peer-to-peer ("p2p") file sharing program designed to allow users to share files between themselves without the need for a central repository.

[5] Jeff Leeds, *Labels Win Suit Against Song Sharer*, N.Y. TIMES, Oct. 5, 2007, http://www.nytimes.com/2007/10/05/business/media/05music.html.

[6] *Id.*

BMG, took the stand. "When an individual makes a copy of a song for himself," she said, "I suppose we can say he stole a song."[7] She had been asked when it was permissible for a consumer to make a copy not of a CD bought by a third party (an obvious violation of the letter of copyright law),[8] but a CD he had purchased himself.[9] In other words, in Pariser's (and presumably her employer's) view, a teenager ripping a copy of his own purchased CD to listen to on an mp3 player is a criminal, liable for up to $30,000 in statutory damages.[10] Although this decision is still pending as of March 2009,[11] and the verdict against Thomas may be set aside and a new trial ordered[12], the attitude expressed by Sony's attorney remains crucial for an understanding of the way distributors view consumers– a theme addressed at length below.

Of course Sony's view, the idea that *any* copying for *any* reason is a criminal act, flies in the face of prevailing attitudes.[13] The *Los*

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[7] Eric Bangeman, *Sony BMG's Chief Anti-Piracy Lawyer: "Copying" Music You Own Is "Stealing,"* ARS TECHNICA, Oct. 2, 2007, http://arstechnica.com/news.ars/post/20071002-sony-bmgs-chief-anti-piracy-lawyer-copying-music-you-own-is-stealing.html (written by Sony BMG's Chief Anti-Piracy Lawyer).

[8] *See generally* 17 U.S.C. § 106 (2006).

[9] Bangeman, *supra* note 7.

[10] 17 U.S.C. § 504(c)(1) (2006). Thirty-thousand dollars for, in Pariser's words, "stealing" a CD that probably cost $18 in a retail store and was already paid for. *See* Bangeman, *supra* note 7.

[11] Capital Records, Inc. v. Thomas, No. 06-1497 (D. Minn. May 15, 2008) (order granting a continuance of the case), *available at* http://docs.justia.com/cases/federal/district-courts/minnesota/mndce/0:2006cv01497/82850/236.

[12] Capital Records, Inc. v. Thomas, No. 06-1497 (D. Minn. May 15, 2008) (order stating the parties must submit amicus briefs regarding whether the Court committed a manifest error of law in instructing the jury), *available at* http://blog.wired.com/27bstroke6/files/thomas.pdf.

[13] *See* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005). Interestingly, it also contradicts oral arguments made by recording industry lawyers in the important Supreme Court decision, Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.: "The record companies, my clients, have said, for some time now, and it's been on their Website for some time now, that it's perfectly lawful to take a CD that you've purchased, upload it onto your computer, put it onto your iPod. There is a very, very significant lawful commercial use for that device, going forward." Transcript of Oral Argument at 12, Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-480.pdf.

Angeles Times reported that 69% of teenagers "believe[] it [is] legal to copy a CD from a friend who purchased the original."[14] And in June, 2005, "the average number of simultaneous users [of file-sharing programs in the United States] . . . reached 8.9 million."[15] While it is clear that the public view of copying in this context conflicts with the view of the music industry, this tension is likely based in large part on the fact that artists are not capitalizing on this artistic renaissance. On the other hand, it is antithetical to public opinion that the simple act of copying an individually owned CD is a criminal act.

Is a copyright regime that creates these results just? Does it comply with the underlying morals governing the relationship between the creators of content and the people who consume it? What are the morals of copyright? These are the questions this article seeks to answer.

II. THE BATTLE OVER COPYRIGHT

Copyright has become a primary legal concern of the Internet generation. Kids raised on the idea of creating their own works out of the raw creative resources of others[16] are seeing this new read/write utopia threatened by a legal regime built for the pre-digital days of the 1970s.[17] This regime, woefully out of step with today's mad rush of technological and cultural innovation, is backed by interest groups like the Recording Industry Association of America ("RIAA") and the Motion Picture Association of America ("MPAA").

The resulting battle between the old guard and the new, while flamboyant in its rhetoric, stumbles over a problem of perspective. On one extreme, we can say that the recording industry is seeking total control over all uses of their content, as Ms. Pariser's quip makes clear.[18] At the other extreme, the so-called copyfighters advocate only

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[14] Charles Duhigg, *Is Copying a Crime? Well . . .*, L.A.TIMES, Aug. 9, 2006, http://www.latimes.com/entertainment/news/la-fi-pollmusic9aug09,0,5791738,full.story.

[15] ELECTRONIC FRONTIER FOUNDATION, RIAA V. THE PEOPLE: FOUR YEARS LATER 11 (2007), http://w2.eff.org/IP/P2P/riaa_at_four.pdf.

[16] *See generally* LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY (Penguin Press 2008).

[17] Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976).

[18] Bangeman, *supra* note 7.

allowing "legal protection for a short period of time, such as a year."[19] Between these two extremes are countless arguments about reformation of existing copyright law and theoretical discussions of why it is justified, or not, in the first place.[20] The trouble has been, however, that most examinations of copyright from a normative perspective have focused on the rights of the creator, the rights of the consumer, or the rights of the copyright holder– and have frequently approached each in isolation from the rest. The recording industry, for instance, is obviously an advocate of copyright holder empowerment, while the copyleft[21] activists focus on the consumer and the creator. Yet both these views are ultimately myopic. Creators do not exist by themselves, or else their creations would be without an audience. Likewise, "consumer" is a nonsensical category without something to consume. Further, copyright holders are either creators or else they are entities creators have transferred their property interest to in exchange for some desired service– most often access to an audience and/or a financial reward. To look at any of these in isolation is to miss the broader point: copyright is not an interest of one individual against all others; rather, it is an ecosystem.

Just as a natural ecosystem cannot exist if every organism in it is isolated from the rest, so too the entire purpose of copyright—to "promote the . . . useful Arts"[22]—is only coherent as a system of *relationships*, of positive liberties, and not just negative. An artist has the right to reproduce his own work, to sell it, or to perform it.[23] But these are very different rights from the right to be free from physical violence or the right to use one's own land. The right to use one's own land, for example, can exist in a vacuum. Alone on an otherwise deserted island, a castaway is free to exercise that right– but it makes

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[19] Joost Smiers, *Abandoning Copyright: A Blessing for Artists, Art, and Society*, DE VOLKSKRANT (Neth.), Nov. 26, 2005, translation *available at* http://www.culturelink.org/news/members/2005/members2005-011.html.

[20] *See generally* Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970).

[21] What is Copyleft?, GNU Operating Sys., http://www.gnu.org/copyleft (last visited March 30, 2009) ("*Copyleft* is a general method for making a program or other work free, and requiring all modified and extended versions of the program to be free as well.").

[22] U.S. CONST. art. I, § 8 ("The Congress shall have power . . . [t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries").

[23] 17 U.S.C. § 106.

little sense to say he can also exercise the exclusive right to reproduce or sell his novel (exclusivity, after all, refers to "excluding" others from doing something). Without other actors with whom to interact, the very idea of copyright will atrophy and die. Any framework for analysis of the law must take this point into account. It must address the rights and desires of everyone involved, in relation to the rights and desires of everyone else.

Central to this essay is an explication of the three moral agents within copyright: creators, consumers, and distributors. Each has a set of rights—which any moral, just law cannot violate—and desires which a well-functioning system should maximize. Creators are responsible for the actual creative act– that spark of creativity sustained by will that gives us music and books, movies and sculpture. Consumers are those for who the creators create– they listen, read, and watch. Distributors bring the two together.

A note of clarification on what is meant by "framework" is in order. The following analysis is not intended as a hard and fast algebraic system for deciding the absolute morality or immorality of an existing or proposed law. It is not a multi-factor test a court can quickly run through to make a ruling. Rather, it should be taken as a method by which discussions of copyright, primarily copyright in the digital realm, might be clarified so that parties to the debate can be more productive in their deliberations. The purpose of this work, then, is simple, if ambitious: to set out a philosophical framework within which to understand and analyze digital copyright law. If successful, the framework will allow questions of copyright, both in current legal application and future evolution, to be better clarified and explicated and, thus, more usefully answered.

Copyright—and the whole of intellectual property, for that matter—suffers from a lack of intuitive obviousness. Of course we want creators to own their work, but what does ownership mean when the thing owned cannot be meaningfully stolen or taken away? How can we speak of having control over something that, in a very real sense, cannot be said to exist in the first place, at least not in the physical world? Unfortunately for lawmakers and those seeking accessible and practical solutions, these questions are deeply philosophical. Answers are not immediately forthcoming, nor will any discernable answers avoid controversy.

III. AN OVERVIEW OF THE FRAMEWORK

The copyright reform battle rages, fueled by the desire of entrepreneurs and artists to find new ways to use content, the

enthusiasm consumers continue to shower upon their endeavors, and the growth of law and industry which see copyright as a property right, sacrosanct as a man's home. Somewhere between the copyfighters and the leviathans of industrialized content are the artists, buffeted by the opposing sides, their wants and needs assumed for them, like peasants represented against their will by the Bolshevik intelligentsia.

Like any debate grown heated and habitual, the actual issues argued over have become lost. Both sides, of course, claim to represent the will of the artists, but the copyfighters see that will directed at the act of creation, while the industry giants hold fast to a more prosaic idea that these musicians, writers, and filmmakers need to make a living, too.[24] Both are true, though each side sees one as necessarily excluding the other.

As any student of philosophy knows, before an effective argument can take place, the parties must go through a period of definition. What specifically are they debating? What terms are they employing and what do those terms mean? These exercises not only serve the useful purpose of clarifying the debate, but they also begin the erection of a framework within which discourse can take place.

Within the proposed framework, each actor is analyzed from the perspective of both his *rights*, which are always inviolate, whether legally or extra-legally; and *desires*, which any copyright regime should seek to maximize, but is not obligated to fulfill at all times. Before going into these in any detail, however, two qualifications need to be set out. First, any framework is at best an abstraction. If the framework were not, if it were as complex and nuanced as the world it seeks to clarify, it would not be a framework– it would be reality. Thus, while this moral framework proposes three actors with finite rights and desires, applying it to genuine situations may require some fudging at the margins. Creators can be distributors and are almost always consumers themselves. Consumers can be creators and, frequently, distributors. Furthermore, the rights and desires set out by the framework are simplified and their interactions streamlined. None of this should lessen the impact of the framework as an analytical tool, however, so long as we remember that it is meant as a starting point for discussion, not an answer to the problem of digital copyright. It is meant to cull the clearly bad (those systems that violate the framework) from the potentially good (those that do not). In the end, the framework ought only to be a distillation of our

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[24] *See* LAWRENCE LESSIG, FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY (Penguin 2005).

preexisting intuitive sense of the relationship between creators, consumers, and distributors.

Second, some clarification by what is meant by "rights" is required. All rights discussed below are those that exist by the nature of the various actors. Thus, creators have certain rights *because they are* creators. But these rights are not exclusive. Others may be created through contract. Thus, if a distributor and a creator enter into a contractual agreement for exclusive sales, a creator could violate that new right—perhaps by selling concurrently through another party—without violating any of those rights specifically addressed below. The right to contract, and any use it may have in bringing the law closer to moral acceptability, is discussed in greater detail in the article's conclusion.

Within the framework, creators are the artists, musicians, writers, and others who provide genesis of the content we consume. Creators have two rights: (1) free creation and (2) status based ownership of their creations. Additionally, creators have two desires: (1) a return on investment and (2) an audience for their work.

Consumers are the largest category (though, in fact, many people drift between all three). Consumers listen to the music, read the books, and watch the television shows produced by creators. Consumers have a single right: to consume available content. They also have three desires: (1) consume quality content, (2) consume diverse content, and (3) do both with low transaction costs.

Distributors are the odd man out, as dedicated agents, they are increasingly unnecessary. The technology of the Internet has allowed creators and consumers to effortlessly become extremely efficient distributors themselves.[25] This is ultimately why organizations like the MPAA and the RIAA are so quick to use Congress and the courts to prop them up in the face of disruptive innovations like p2p: the dinosaurs of the one-to-many[26] distribution age are quickly becoming

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[25] The growth of p2p networks attests to this fact. *See* Gary Kim, *Report: 400 Percent Growth Ahead for P2P Internet Traffic*, CABLE.TMCNET.COM, Oct. 21, 2008, http://cable.tmcnet.com/topics/cable/articles/43418-report-400-percent-growth-ahead-p2p-internet-traffic.htm.

[26] As opposed to "many-to-many." One-to-many systems are those, like traditional retail stores, where a customer purchases his goods from a single source. For example, I can walk into Wal-Mart or Target and buy nearly anything I need, and all those goods have been pre-selected by the managers of the store. In a many-to-many system, I can simultaneously gather products from a huge number of suppliers while, at the same time, acting as a supplier myself. The standard p2p file-sharing application, where a user is both downloading and uploading songs, is the prime example of this.

not only superfluous, but also a drain on maximizing the rights and desires of the crucial creators and consumers. Distributors have no natural rights within the framework and but a single desire: a return on their investment.

IV. CREATORS

The ecosystem through which creative works flow must first include those responsible for the works themselves. Creators are our artists, writers, musicians, and directors. It is their energy and their imagination that provides consumers with a role in the framework. Furthermore, it was the creators' need to find those consumers that gave rise to distributors. The rights of creators are the most difficult to deal with, since they seem both morally imperative and, if too strong, open to the potential for authoritarian abuse.

Creators are afforded two rights and two desires within the framework. Their rights, those critical elements that no system or other actor can morally violate, are (1) free creation and (2) ownership in their creative status. Beyond these rights, creators express two desires within the system: (1) a return on their investment and (2) an audience for their work.

A. FREEDOM TO CREATE

For true creativity to be possible, the creative process must be unencumbered by proscriptions, whether arbitrary or considered necessary for maintenance of the public good. Of course, this only goes so far. If an artist required the blood of children to splash upon his canvases, we would have a valid argument against allowing the act. We must let consumers judge the quality of creative works, not lawmakers, or else what we end up with is not the lush vibrancy of nature but the American Kennel Club, where breeds are judged only by their absolute conformity to an arbitrary norm. And like the genetic illnesses that plague purebreds, this proscription of creation cannot lead to a flourishing of the arts. Creators must be free.

Because creation, by its very nature, is about ideas and expressions not yet known, prior constraints or outright censorship undermine the core of the act itself. After all, how can we know what creations are good or bad, valuable or without purpose, if some are prevented from birth entirely? Free creation, then, is the bedrock right of the creator. But this leaves open an important question. What do we mean by "creating?" While the discussion above speaks to the novel nature of the act, creation cannot occur in complete isolation– it has to be a

product of existing resources. We create *out of* something. Our courts have long recognized this. Justice Story was able to write, as far back as 1845, that:

> [T]here are . . . few, if any, things, which . . . are strictly new and original throughout. Every book in literature, science, and art, borrows, and must necessarily borrow [sic], and use much which was well known and used before. No man creates a new language for himself . . . in writing a book. He contents himself with the use of language already known and used and understood by others. No man writes exclusively from his own thoughts, unaided and uninstructed by the thoughts of others.[27]

Yet if nothing is new, how are we to distinguish between genuine creation and outright copying? The Copyright Act's Fair Use provision attempts to pry the two apart by allowing new works to build off of old works when the "purpose and character of the use" is "transformative."[28] The Supreme Court has said that "the goal of copyright . . . is generally furthered by the creation of transformative works . . . . [T]he more transformative the new work, the less will be the significance of other factors . . . ."[29] But this begs the question: what is, and what ought to be, transformative? The way to answer this is to remember that free creation, no matter how strong a right, cannot entail violating other rights. The key right a non-transformative use violates is the right of the creator to have a recognized status ownership in his creations. The balance here is between acts of copying, which strip the original owner of his right, and acts of transformation, which do not. We want a system of copyright law, for instance, that allows for bands to record covers, but does not allow exact copies of preexisting works. And, potentially more controversial, it seems right that a law should prevent scanning and uploading of books, while providing for a robust network of non-commercial fan-fiction. It should be clear that the difference between the proscribed acts and the permitted ones is that the former effectively take a creator's work away from him, while the latter

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[27] Emerson v. Davis, 8 F. Cas. 615, 620 (C.C.D. Mass 1845) (No. 4,436).

[28] 17 U.S.C. § 107 (2006).

[29] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994).

actually enhance the original work by increasing the recognition and reputation of the creator responsible for it. This idea is discussed in more detail below.

B. RECOGNIZED CREATOR STATUS

Creator status is the most conceptually difficult right in this proposed moral system. It treads a fine line between outright ownership in a property sense—the base cause of the current copyright troubles—and a meaningless title worth little more than a pat on the back. Recognized creator status is the right of the creator to *be* the creator of his works. An author, for example, stands in a particular relationship to the novel he has written. He can sell the manuscript or give the film rights to a third party, but he remains the novel's author. Nothing he does, post-writing, can take that status away. It cannot be sold, donated, or stolen, and any attempt to do so is fundamentally incoherent. For instance, The Rolling Stones created "Satisfaction," no matter who owns the rights to reproduce it. Creator status can best be understood as an ideal, a consequent instead of an antecedent. What we want is a right that provides creators recognition and control of their works, without the latter extending so far as to prevent others from engaging in the creative process themselves. In a sense, this right should be seen not as a barrier against other creators, but as a limit on the permissible actions of consumers and distributors. In other words, if a potentially infringing use is undertaken *within* the creative process (remixing, fan-fiction, etc.),[30] then the law and the courts should be more inclined to allow it. But if that use is in the consumption or distribution process (copying, resale, piracy), the law ought to view it more harshly. The right is weaker, therefore, against other creators than it is against consumers and distributors.

An explanation of the two undesirable extremes between which this right sits will prove helpful in clarifying the idea. The first extreme is what the law recognizes now: creative ownership as a property interest.[31] Yet, as a property interest, creative ownership in intellectual property is decidedly unique. Our current conception of

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[30] "Remixing" is the process of taking prior creative works, most often music, and combining and editing them into something new. "Fan-fiction" is a genre of writing where the author creates new stories based upon the works of other authors.

[31] *See generally* ROGER E. SCHECHTER ET AL., INTELLECTUAL PROPERTY: THE LAW OF COPYRIGHTS, PATENTS AND TRADEMARKS (West Publishing Co. 2003).

property finds its roots in Locke's *Second Treatise of Civil Government*.[32] Here, a property interest is created when labor is mixed with some material.[33] The merger of labor and material vests the one doing the merging with a property right.[34] While this makes intuitive sense—if I make the effort to gather apples, I own those apples; or if I labor to turn lumber into a house, I own the house—it does not apply as easily to intangible creations. Imagine I have just completed the first draft of a novel. I am that novel's creator but what have I mixed my labor with? I have taken no preexisting material and turned it into the novel, unless we grant ideas material status. But, even so, I have not denied others the use of those ideas; at least not in the way my gathering or building denies others the use of the apples or lumber. Lurking beneath many concerns of copyright laws is just such an assumption, however. Property for one is a deprivation of property from another. Yet, while this concept of property works for houses, it does not necessarily make sense for music.

From the traditional, Lockeian perspective—the perspective of modern copyright law—an author may write a novel, allowing him to sell both the novel and his author status to a publisher in exchange for a financial reward, distribution, or promotion deal. Once that interest is sold, like the transfer of a fee simple in real property, the original owner no longer holds any legal connection to it.[35] Of course, he might sell a partial stake in his copyright, but even this should strike us as odd. Copyright vests in the creator through the act of creation. Selling the right is akin to selling the act of creation, and doing so after the fact. Metaphysically, this is nonsense, and the law ought to treat it as such. It seems to arise from confusion between different notions of status. On the one hand, there is legal status: a characteristic created and applied by law. If I purchase a record from a store, that transaction confers the legal status of owner of the record upon me. There is no fact of the world—no non-legal fact—that makes me conceptually the owner of the record. And, given that the status is a legal construct, it can be transferred. I may resell the record without conceptual confusion. But this is in stark contrast to another sort of status, one born of non-legal actions. If I produce a painting, I am

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[32] *See* JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT, Chapter 5 (1690), *available at* http://www.constitution.org/jl/2ndtr05.txt.

[33] *Id.*

[34] *Id.*

[35] *See* WILLIAM B. STOEBUCK ET AL., THE LAW OF PROPERTY (West Publishing Co. 2000).

that painting's painter. Even if I sell the painting at a later date, I am still the painter. There is simply no meaningful way in which I can give up that status because it was not bestowed upon me but, rather, is simply another way of thinking about a relationship. And, since that relationship can never be undone (I cannot "unpaint" the painting), I can never give up my status as painter.

This raises the interesting question of how to handle works made for hire. If the act of creation cannot be sold post-creation, can it be alienated pre-creation? There is a way out of this trap. The Copyright Act defines a work for hire as either "a work prepared by an employee within the scope of his or her employment" or "a work specially ordered or commissioned."[36] Because both of these entail entering into a relationship *before* the start of the creative process, it becomes possible to see the creator not as a lone individual but instead as the greater organization itself. This idea makes more sense in light of the Supreme Court's decision in *Community for Creative Non-Violence v. Reid.* The Court listed factors for determining whether the creator is an employee engaged in producing a work for hire, including "the hiring party's right to control the manner and means by which the product is accomplished."[37] Thus, by meeting these requirements, the creator can be thought of as a piece of a larger organism, with that organism as the ultimate, legal creator of the work– and, therefore, the entity possessing the rights discussed in this article.

At the other extreme of possible creative rights is the idea of this status as merely a superficial label slapped on the creator at the completion of his work, but worth little more than the title of "World's Best Boss" on a coffee mug. This status affords the creator no control and no rights over how his creation is used. It is most closely represented in the open source software movement.[38] When I download a copy of an open source program, such as Mozilla Firefox, I am installing an application that is the product of countless authors– yet I remain unaware of any of them.[39] Their work, by nature of the

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[36] 17 U.S.C. § 101 (2006).

[37] Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 750–51 (1989).

[38] Open Source, Open Source Initiative Home Page, http://www.opensource.org (last visited Mar. 30, 2009) ("Open source is a development method for software that harnesses the power of distributed peer review and transparency of process. The promise of open source is better quality, higher reliability, more flexibility, lower cost, and an end to predatory vendor lock-in.").

[39] Mozilla, About Mozilla, http://www.mozilla.org/about (last visited Mar. 30, 2009).

open source license,[40] is no longer theirs the instant they release it into the online community. Clearly, this is just as undesirable for creative and artistic works as the copyright-as-property option. What is needed instead is a form of status that (1) is permanent, (2) inalienable, and (3) affords some degree of control to the creator.

The way to solve this is to look at creator status as the right to prevent others from acting in such a way as to hurt the creator's relationship to his creations. Distributing his works without attribution would do this, as well as reproducing those works in such a way as to prevent him from profiting from his labor. In one sense, this looks much like the exclusive rights to reproduction, adaptation, distribution, public performance, and public display enumerated in the Copyright Act of 1976.[41] But instead of being exclusive, they are to be judged more on a sliding scale.

Does the form of reproduction or distribution engaged in by the defendant hurt the creator's status right either by undermining his recognized relationship to the work (stripping his name from it, for instance) or by depriving him of his ability to exercise that right (by usurping the market for the existing work)? Within this new understanding—what amounts to a revised fair use doctrine—the court needs to look not to "the purpose and character of the use" or "the amount and substantiality of the portion used,"[42] but to the impact the use has on the creator's rights. In this way, a use such as posting an anime remix to YouTube, does not violate the right in that it does not usurp the market for the original because it is, in effect, not the original. The anime remix is not a derivative work "that creators of original works would in general develop."[43]

As discussed above, in the section on free creation, the strength of this right is to be judged in relation to the role of the person infringing. Is the infringement furthering a consumptive or distributive role (downloading or uploading exact copies)? In this case, the right to ownership status creates a strong prohibition on the act. Is the infringement instead furthering a creative act (remixing, fan-fiction, satire, parody)? Then the creator's ownership right becomes a weaker limitation. Unfortunately, such variable weight for

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[40] *See generally* GNU Operating System, GNU General Public License, www.gnu.org/copyleft/gpl.html (last visited Mar. 30, 2009).

[41] 17 U.S.C. § 106.

[42] 17 U.S.C. § 107.

[43] *Campbell*, 510 U.S. at 592.

the right provides no bright line rule, but it is the only way to make sense of the competition between ownership and free creation, and between ownership and consumption/distribution.

C. RETURN ON INVESTMENT

While freedom of creation and status are a creator's only two rights, he also expresses desires. These do not carry the imperative nature of the former, but a just system of digital copyright ought to maximize them to the greatest extent possible. The first, return on investment, is ultimately the desire of the creator to be afforded the ability to continue creating. If making a single song costs its composer or performer $100 and that creator only earns $10 as a result, he is unlikely to produce more songs in the future. Obviously the math is not always so clear, but the basic idea holds: if it costs a creator more to create than he gains from creating, he is likely to pursue a different role.

Money need not be the only form of return on investment. A teenager mixing songs over his favorite anime episodes, and posting the results to YouTube, is not earning money, but he is getting something out of the act. It may be notoriety and a fan-base or even the simple thrill of creation. In any case, the return on the creative act is greater than the effort put forth. If it were not, he would stop mixing videos and would return to only watching them.

This is not quite as large a claim as it may seem. The teenage mixer must make decisions about how to spend his time. In theoretical terms, he must decide how to allocate a scarce resource (the discretionary hours he has in each day) between alternative uses–one of which is mixing anime episodes. If other uses provide him with more value than mixing, he will allocate to them. And if the mixing consumes more than he is getting out of it (i.e., is of negative value), then any use of his time that provides positive value will be more desirable.

"Return on investment" is a desire—and not a right—because a moral system cannot force consumers to provide for creators against their will. Consumers cannot take from creators without violating the right to creator status, but that right is not violated when consumers choose not to give. The market, executed with free choice, is the arbiter of which creators will have this desire fulfilled and what form that fulfillment will take.

Furthermore, the return a given creator seeks cannot stand counter to the rights of other agents within the system. For example, imagine a creator who gathers the works of other creators, mixes

them, and distributes them on the Internet without even going so far as to grant attribution. This act itself—seeing his videos on a website—might be all the return he seeks, but that return requires that he undermine a fundamental right. This he cannot do. Desires are always subservient to rights.

Finally, this desire can be examined in the converse: if the system should promote a creator attaining a return on his investment, it should also discourage creators, consumers, and distributors from earning returns without first making an investment. Thus, p2p file-sharing, for example, even if it does not amount to outright piracy and violate the status right of the creator, might fail an analysis within the framework if the only ones reaping the rewards, such as the writers of the software, have not made a creative investment in the works themselves.[44] Accordingly, this returns to the idea of creative acts having more weight against a finding of infringement than consumptive or distributive ones.

D. FINDING AN AUDIENCE

Creators desire an audience for their creations. While it is conceivable that an artist might paint simply for his own amusement, never showing the painting to anyone else, this is still creation for an audience– if only an audience of one. Most creators, however, presumably seek as large an audience as they can manage and often enter into deals with distributors for exactly this purpose. The result of seeking fulfillment of this desire, then, has frequently taken the form of the creator violating his own right to creative status by selling his property interest in his creation to a third party. In exchange, he is given access to distribution channels and promotional networks, and the costs of using each is borne by the distributor. However, as mentioned above, the importance of a desire can never exceed the absolute authority of a right, making this kind of arrangement a *de facto* violation of the framework.

Often, the desire for an audience must be weighed against the desire for return on investment. Because consumers have only a finite amount of resources to spend on finding and consuming creations, a higher cost per creation—a higher return on investment to the creator—will result in fewer consumers. A creator needs to decide which is more important and what significance he will place on each.

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[44] Why isn't the act of writing and distributing the p2p software an investment? Strictly speaking, it is, but it is an investment in a non-creative work, and therefore not a consideration in the tight constraints of the framework.

V. CONSUMERS

While it is certainly conceivable that creators might be willing to create in a vacuum, as discussed above, most want other people to experience their work. These other people are the content consumers and, like their fellow actors, they have a set of rights and desires that must be considered when evaluating an existing system or constructing a new one within this proposed moral framework.

Consumers have one right: the consumption of available content. They also have three desires: (1) consume quality content, (2) consume diverse content, and (3) low transaction costs for each.

A. CONSUMPTION OF AVAILABLE CONTENT

Unlike creators, consumers have one right: the right to consumption of available content. This right is very nearly a logical necessity when viewed in relation to the creator's right to free creation. Imagine a creator free to paint, compose, or write as he pleases. No human agent burdens him with a set of content-based restrictions on his work. Still, this creator works within a society where all content must pass through a censoring agency before it can be dispersed to the public at large. If every creator creates primarily for an audience, this post-creation restraint is indistinguishable from the pre-creation restraints discussed in the previous section. In either instance, the creator's whole purpose for engaging in his work has been usurped. The result of this line of reasoning is that, in order for the creator to be able to freely create, he must have an audience who can freely consume. Thus, the free consumption right of consumers can be seen as a consequence of the antecedent right of creators to freely create.

What does this consumer right look like? What does it mean to consume freely? Stated as simply as possible, the right to free consumption is the right to consume any content, provided that consumption does not infringe the rights of fellow actors. Thus a governmental ban on erotic novels violates the right, while a governmental ban on stealing an author's erotic novel does not. It is a negative liberty, a liberty open to anything and everything the consumer may desire, with the solitary proviso that he not infringe the rights of others, including other consumers.

B. CONSUMPTION OF QUALITY AND DIVERSE CONTENT

Beyond that single right, the consumer within this moral framework possesses three desires. He wants to (1) consume quality content, (2) consume diverse content, and have (3) low transaction cost access to both. The first two are fulfilled via the creator's rights of free creation and ownership and the distributor's desire to disseminate works to a large and enthusiastic audience. If a great deal of creators are creating a great deal of content, if those creators are variant in their level of skill and individual taste, and if there exists a distribution system that puts this content in front of consumers, then the content consumers will have this desire maximized. The desire is not a right, however, because any creator has the right to cease creation or to never release his work to an audience.[45] We cannot say that a creator choosing such a course of action has violated a right or else we would be justified in forcing him to get back to work. For that reason, consuming quality and diverse content must remain only desires.

C. TRANSACTION COSTS

Finally, low transaction costs are a key factor in allowing a consumer to fulfill his two other desires. If finding new musicians, for instance, is terribly time consuming or if the cost of buying music is prohibitively high, consumers will not be able to afford quality content or take the risk of sampling new and unknown works in search of diversity. Thus, we should avoid a system that places significant and unnecessary stumbling blocks in the way of consumers exploring and consuming whatever kind of content they desire.

Much of the recent case law dealing with file sharing has implicitly taken up the issue of transaction costs. Starting with the seminal 2001 case out of the Ninth Circuit, *A&M Records v. Napster,*[46] the desire for

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[45] Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 553 (1985) (This distinction was implicitly recognized by the U.S. Supreme Court when it placed great weight against a finding of fair use due to the fact that the infringed work had not yet been published. In arguing that the use violated the author's right to first publication, the Court wrote, "Because the potential damage to the author from judicially enforced 'sharing' of the first publication right with unauthorized users of his manuscript is substantial, the balance of equities in evaluating such a claim of fair use inevitably shifts.") *Id.* at 553.

[46] A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1018 (9th Cir. 2001) (holding that Napster, by allowing its users to easily find and download digital versions of copyrighted songs, could be held liable for contributory infringement of the plaintiff record company's copyrights.).

low transaction costs has been granted little weight. Before looking at the case, however, we need first know, as will be explained in further detail below, that distributors do not have any natural rights within the moral framework. True, they may have contractual rights created through copyright alienability, but those are external to this moral philosophy– not to be ignored, but also not to be given such weight that they smother all discussion of the inherent rights and desires of the three moral actors. Consumers, as we have seen, desire low transaction cost access to content. And this desire, when fulfilled, results in more consumption and, thus, a wider audience for creators, maximizing their corollary desire. It is interesting, then, that the Ninth Circuit places so much emphasis on the deleterious effects on distributors of a technology that benefits these two key desires.

When rejecting Napster's argument that "try-before-buying" constitutes a fair use, because it allows consumers to easily "decide whether to purchase the recording,"[47] the Court clearly privileged the immediate economic gain to distributors over the desire of consumers to find new music and the desire of creators to broaden their consumer reach. It argued, for instance, that the existing market for regulated downloads precludes fair use access to unregulated file-sharing: "The record supports a finding that free promotional downloads are highly regulated by the record company plaintiffs and that the companies collect royalties for song samples available on retail Internet sites."[48] Yet regulation always increases transaction costs by forcing limits on what a consumer can gain access to. "Free downloads provided by the record companies," the court pointed out, "consist of thirty-to-sixty second samples . . . ."[49] Thirty-second samples are not the actual content, though, and their exclusive availability means consumers must take additional steps—and incur additional transaction costs—in order to gain access to the full songs.

In *Napster's* follow-up, *Metro-Godwyn-Mayer Studios v. Grokster,* the Supreme Court dismissed this low transaction cost access by claiming "that the ease of copying songs or movies using software like Grokster's and Napster's is fostering disdain for copyright protection."[50] By further arguing that "digital distribution

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[47] *Id.* at 1018.

[48] *Id.* at 1018 (citing A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 913 (N.D. Cal. 2000)).

[49] *Id.* at 1018.

[50] Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 929 (2005) (citing Tim Wu, *When Code Isn't Law*, 89 VA. L. REV. 679, 724–26 (2003)).

of copyrighted material threatens copyright holders as never before,"[51] the Court implied that lower transaction costs—and therefore more consumption—was not to be taken seriously when weighed against the rights of distributors, the copyright holders in this case.[52] Ultimately, the *Grokster* decision came down to two issues: (1) the loss of revenue to distributors and, through them, creators; and (2) the undermining of the existing distributor business model. The explicit concern of the case, whether Grokster was "liable for acts of copyright infringement by third parties using [its] product,"[53] was simply a circuitous route to the question of transaction costs.

VI. DISTRIBUTORS

Distributors perform the function of both transferring content from creators to consumers and making consumers aware of that content in the first place. Thus it may be helpful to think of them as "distributors and promoters." As will become clear, they are the odd man out in this moral framework. While they possess a desire, just as creators and consumers do, they have no rights. Distributors only exist in order to fulfill the desires of the two other agents in a way that does not violate their rights.[54]

Distributors, by definition, do not create and they do not consume. Of course, it's possible for a distributor to also be an artist, just as the employees of a distribution company may listen to music, but that merely means they are engaging in more than one role. So far as the strict role of distributor goes, this agent acts only as a facilitator. Distributors do not have rights for a simple reason: they are not necessary to the system. Creators could hand deliver their creations to consumers and consumers could do the legwork themselves to find

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[51] *Id.* at 928.

[52] That MGM is a studio, and thus the apparent source of the content, should not allow them to claim the title of creator. MGM itself does not create content, but is only the edifice through which content creation is funded. Of course, this brings up issues of works-for-hire discussed earlier.

[53] *Metro-Goldwyn-Mayer Studios*, 545 U.S. at 918–19.

[54] Again, as discussed in the introduction, the lack of rights *within the system* does not preclude the creation of rights through contracting. If a creator and a distributor contract for an exclusive distribution agreement, the distributor's resulting right would be violated by that creator utilizing another distribution service, as well.

new content. These actions are often easier if a dedicated distributor is involved, but they can occur without one.

Rights arise out of relation to content. A creator has a right to create. A consumer has a right to consume. But there is clearly no such thing as a "right to distribute." Distribution is always only a contractual agreement between a distributor and a creator—for purposes of pay in exchange for content promotion and dissemination to a market, for instance—or a distributor and a consumer– money exchanged for the purchase of or subscription to content. Thus, while it can be said that distributors have rights arising from contracts and they have a right not to have a contract breeched, they do not possess inherent rights arising from the nature of their role within the moral framework.

Distributors *are not necessary* for a system of content creation and exchange to function. They may help it to function better, of course, but a system could exist without dedicated distributors entirely. Thus, any copyright regime or court decision that grants distributors rights—again, rights beyond the simple right to contract—is in violation of this system of morals. That regime or court decision is, in effect, *prima facie* morally wrong and immediately suspect. Unfortunately, the courts and law have increasingly privileged distributors at the expense of creators and consumers.[55] If this framework is correct in its analysis, then the courts and the law have engaged in a systematic violation of rights.

How did distributors become so powerful? In an ironic twist, we can blame their assent on the very things that now have them running scared: technology and economics. Before the Internet and digital distribution, a creator wanting to get his work to a large audience had to do so via physical artifacts, such as books, records, and film reels. These methods were expensive, both in production and in costs associated with warehousing and shipping. Few artists, especially those trying to establish themselves, could afford to distribute and promote their own work. To solve this dilemma, they turned to distribution companies, such as the record labels or the major publishing houses. These corporations had the resources for distribution and promotion but not the content. Unfortunately, they often demanded not only a portion of the profits but also a transfer of ownership in the content or a grant of joint copyright. Once large corporations, with vast legal resources, became major holders of copyrighted works, it was suddenly in their interest to drag the

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[55] For example, see the discussion of *Napster* and *Grokster* in the "Transaction Costs" section of this note.

benefits of intellectual property law in their direction. Now that new technologies have undercut the original need for centralized distribution and promotion, the old guard is using the law to stave off its eventual and inevitable demise.[56] Understood in the language of this framework, technology and economics allowed what was otherwise only a role to become a full fledged and independent agent.

How can this be fixed? From the perspective of radical statutory reform, an effective way to undo the over-privileging of distributors is to remove them from the copyright equation entirely. In other words, the law might vest copyright in the creator and then forbid him from transferring it to a third party– shifting from copyright as a property interest to copyright as a status interest in line with the second right of creators discussed earlier. Doing so would recognize distributors' sole right of contract within the three agent moral framework. Distributors could license use of the creator's work, much like a company can license the use of a patent, thus making the available relief primarily permanent injunction. The distributors would no longer be able to speak from the moral high ground of the creator.

Of course, creators themselves could still sue with the resulting statutory damages. However, based on their new set of rights and desires, they may have more incentive to try to work with new business models such as file sharing networks and individual sharers rather than trying to shut them down. Any business model or means of distribution that results in a greater return on investment and/or a larger audience (depending on how the particular creator weighs those) is to the advantage of these creators.

Distributors, on the other hand, are invested in a specific model– their own. The alienability of copyright through electronic means thus creates the incentive to see consumers not only as a revenue source but also, in the case of distribution by file sharing, a potentially dangerous competitor.

How can a consumer be a competitor? Is not the consumer the very person who perpetuates the distributor's business model by buying his wares? In the case of a physical medium—a paperback novel, for instance—the consumer is rarely a threat to the distributor. Even if that consumer, after reading the book, gives it away to a friend or sells it to a used bookstore, he has not increased the number of copies in circulation beyond what the distributor already sold. His copy of the book has not multiplied, in other words. But a digital file can be copied perfectly over and over again. Thus, in the worst of

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[56] *See generally* CHRIS ANDERSON, THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE (Hyperion 2006).

conditions from the distributor's point of view, a single consumer might purchase a single copy and then, through the Internet, sell or give away free copies to all other potential consumers across the globe. Exclusive distribution, from a technical standpoint, cannot vest in a single distributor– unless the files are protected by electronic countermeasures.[57]

Arguably, the proposed shift will happen in practice. As more content genres come in line with Internet distribution—music already has;[58] movies and television are quickly transitioning;[59] but books lag behind[60]—creators will feel less need to sell their copyrights to large companies with the resources and infrastructure to distribute in the brick and mortar world.

VII. WHAT THE FUTURE MAY HOLD (A CONCLUSION OF SORTS)

If our current system of copyright is allowed to continue, with the law increasingly modified for the benefit of the major content holders, the future of digital content is nothing if not bleak. Nearly any use of content, except by a lone consumer isolated in his own home and sharing the experience with no one else, is an infringement of the exclusive rights guaranteed by the Copyright Act. The defense of Fair Use, once the means by which reasonableness and a spirit of free culture could overcome the statutory limits, has been eviscerated by the one-two punch of digital distribution and the anti-circumvention provision of the Digital Millennium Copyright Act ("DMCA"), which provides that "[n]o person shall circumvent a technological measure that effectively controls access to a work protected under this title."[61] Software is fast becoming the primary means by which we attain and consume content. The success of iTunes (topping three billion songs

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[57] Yet even these can be broken through the use of even more technology, creating an arms race that works against the distributor's business model far more than it works against the consumer's encroachment on the distributor's interests.

[58] *e.g.*, iTunes Homepage, http://www.apple.com/itunes (last visited Mar. 30, 2009) (music distribution on the Internet).

[59] *e.g.*, Hulu Homepage, http://www.hulu.com (last visited Mar. 30, 2009) (movie and television distribution on the Internet).

[60] *e.g.*, John Siracusa, *The once and future e-book: on reading in the digital age*, ARTS TECHNICA, Feb. 2009, http://arstechnica.com/gadgets/news/2009/02/the-once-and-future-e-book.ars.

[61] 17 U.S.C. § 1201(a)(1)(A) (2006).

sold in July 2007)[62] and other legal music download services—which, of course, pale in usage to the free p2p networks—has effectively already done this to music. The days of buying albums in a physical medium are coming to an end.[63] Movies and television, too, are close.[64] Many of the networks are now making a great deal of their programming available for free viewing on their web pages, and iTunes includes movies and television episode downloads in addition to songs.[65] Newspaper sales decline as more of us get our news online.[66] Books seem the last mass media form to hold fast to physical fixation, but even that bastion of the tangible is crumbling.[67]

At first glance, this seems to be a renaissance in the way we acquire and consume content. The costs of physical distribution and warehousing will vanish and prices will decline. New artists and writers will be free from the need to have their work filtered by massive publishing firms and can, instead, allow that filtering to occur at the consumer level, thereby resulting in more artists on the market and more variety for potential fans. But the current law may very well prevent that from happening. Digital Rights Management ("DRM"),[68] already built into stores like iTunes and products like Amazon Kindle, means that any attempt by the consumer to use his legally-purchased content in ways not explicitly endorsed by the copyright holder—the distributor, in most cases—and programmed in to the files themselves,

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[62] Max Brenn, *Apple: iTunes Sales Top Three Billions Songs*, EFLUXMEDIA, July 31, 2007, www.efluxmedia.com/news_Apple_iTunes_Sales_Tops_Three_Billion_Songs_07377.html.

[63] ANDERSON, *supra* note 56.

[64] *Id.*

[65] *e.g.*, What's On iTunes, http://www.apple.com/itunes/whatson (last visited Mar. 30, 2009).

[66] David Lieberman, *Newspaper Sales Dip, but Websites Gain*, USA TODAY, May 9, 2006, www.usatoday.com/money/media/2006-05-08-newspaper-circulation_x.htm (last visited Mar. 30, 2009).

[67] Industry Statistics, http://www.openebook.org/doc_library/industrystats.htm (last visited Mar. 30, 2009).

[68] Electronic Frontier Foundation, http://www.eff.org/issues/drm (last visited Mar. 30, 2009) ("DRM can prevent you from making back ups of your DVDs and music downloaded from online stores, recording your favorite TV programs, using the portable media player of your choice, remixing clips of movies into your own home movies, and much more.").

is a violation of the DMCA.[69] And for this crime, there is no Fair Use defense. Because the law has given distributors so much power now, it has granted them disproportionate control in the future. The DMCA, far from protecting copyright, allows purveyors of DRM-protected content to rewrite the legal system however they please.

This is why we need to rethink our existing law and why we must do so within a framework that allows a clear vision of who has certain rights. The effort to protect creators has led to a legal regime that, in the digital world, serves primarily to protect distributors. This is particularly dangerous once we recognize the decreasing need for distributors. Artists can reach fans directly and distribute their work themselves, but if the effective channels through which to do so (i.e., online stores like iTunes and Amazon) impose distributor-dictated DRM, then those distributors can use the law to maintain their business model long after it has become nothing more than a burden on an otherwise vibrant creative ecosystem.

This raises the question of what a system of laws, respectful of the rights and desires of all actors, would look like. At first blush, coming up with such a system ought to be as easy as running through a framework like the one this article proposes and formulating a set of compatible rules. Unfortunately, it is not that simple. The framework, in the end, is only a goal. It is a proposal of what an ideal creative culture looks like– but that picture is not capable of telling us how to get there. Because copyright is a legal construct and not a deductive principle of mathematics, the only way we, as limited human beings, can approach it is by trial and error. Does a law work? Does it produce the results we want? If yes, leave it in place. If not, revise or repeal it. Ultimately, true copyright reform must take this evolutionary track. Strict and unchanging rules got us into our current trouble, since those rules were unable to adapt in the path of advancing, and unpredicted, technology.

The final question this analysis leaves open is: what we can do now? The power of the distributors is so great, their influence over lawmakers so complete, that it is unrealistic to expect an overhaul of our copyright regime anytime soon. Yet the very nature of copyright, with its property like control by creators, can provide an effective and immediate fix. Early on in this discussion, the concern over freedom of contract was introduced. The ability of creators to contract away their rights to distributors is the primary cause of our profoundly broken system. Yet this same ability can also be the cure. Legal

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[69] 17 U.S.C § 1201(a)(1)(A).

organizations like Creative Commons provide simple and free licenses which "let authors, scientists, artists, and educators easily mark their creative work with the freedoms they want it to carry."[70] A songwriter, for instance, can apply the Creative Commons Music Sharing License to his songs and grant his fans "permission to download, file-share, copy, and webcast– but not to sell, alter, or make any other commercial uses."[71] Or he might choose a Sampling License, so as to "invite other people to use a part of [his] work and make it new."[72] By contractually limiting their rights, creators can design their own systems of intellectual property protection and bypass the laws as they are currently on the books. With licenses like these in place, future creators will not have to rely on the unpredictable Fair Use defense– they will know up front how much of the work they can utilize and in what ways. Furthermore, by replacing the strict rules of copyright with the contractual freedom of something like Creative Commons, creators can experiment with legal systems so as to maximize their rights and interests while allowing consumers to maximize their own.

The moral framework proposed by this article is not a solution in itself. It is not a roadmap to one, either. Instead, the framework is a lens through which questions of digital copyright and the use and creation of content can be seen and better understood. Only by standing on common ground—by sharing the same language, so to speak—can we hope to develop legal structures beneficial to everyone—not just creators, not just consumers, not just distributors, but all three—a system beneficial to our culture as a whole.

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[70] Creative Commons, http://creativecommons.org (last visited Mar. 30, 2009).

[71] Creative Commons, Creative Commons Music Sharing License, http://creativecommons.org/license/music (last visited Mar. 30, 2009).

[72] Creative Commons, Choose A License, http://creativecommons.org/license/sampling (last visited March 30, 2009).